

**HCA Health Services of New Hampshire, Inc. d/b/a  
HCA/Portsmouth Regional Hospital and  
Madelon M. Twitty. Case 1-CA-29691**

March 29, 1995

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS COHEN  
AND TRUESDALE

This case<sup>1</sup> presents the issue of whether the judge correctly found that the Respondent did not violate Section 8(a)(1) of the Act by interrogating, suspending, and discharging Charging Party Madelon Twitty. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions, as further discussed below, and to adopt the recommended Order.

We agree with the judge that the Respondent lawfully discharged Twitty for maliciously spreading false rumors about Polly Kuhn, Twitty's supervisor, in an effort to have Kuhn removed from her position or fired. In exceptions, the General Counsel contends that the judge erroneously found that Twitty's conduct removed the Act's protection from her attempts to initiate concerted activities with fellow nurses about Kuhn's supervision.

The credited evidence shows that Twitty had two problems with Kuhn. One problem was at least potentially a matter of mutual concern with other employees about Kuhn's management style. The other problem was purely personal. Kuhn had discontinued her predecessor's individual preferential treatment of Twitty. Kuhn had also warned Twitty about excessive absenteeism and about antagonistic behavior towards co-workers. Under the circumstances, Twitty had good reason to suspect that her continued employment depended on Kuhn's removal or firing.

The judge correctly summarized Board precedent which holds that the Act protects employees who initiate or engage in concerted activities to protest a common aspect of their supervision. When seeking to enlist other employees in protests against Kuhn's management style, Twitty was at least initially engaged in

protected concerted activities. It does not matter that other employees were not very receptive to her protests.

On July 23, 1992, however, Twitty told several employees rumors about Kuhn's past employment history with Massachusetts General Hospital. For the reasons fully set forth in the judge's decision, the rumors were false and potentially quite damaging to Kuhn's professional reputation.<sup>3</sup> Furthermore, Twitty knew or reasonably should have known this.<sup>4</sup> Nevertheless, she repeated these rumors to at least four nurses during three separate conversations.

A defamatory statement is so opprobrious as to lose the protection of the Act if it is made "with knowledge of its falsity, or with reckless disregard of whether it was true or false." *KBO, Inc.*, supra, citing *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966); also see *Pizza Crust Co.*, 286 NLRB 490, 507 (1987). As previously discussed, Twitty's conduct was of this egregious nature. Moreover, Twitty has essentially admitted that she used the false rumors to rally support for her effort to get rid of Kuhn. As found by the judge, Twitty's single-minded effort no longer had anything to do with resolution of the alleged mutual concerns about employees' working conditions. Instead, Twitty recklessly spread false rumors in a malicious attempt to resolve the personal threat posed by Kuhn's continued supervision. Accordingly, the Respondent did not violate the Act either by interrogating Twitty about her rumor-mongering or by suspending and firing her for it.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Robert J. DeBonis, Esq.*, for the General Counsel.  
*Ralph Woodman and Francis Quinn, Esqs.*, of Portsmouth,  
New Hampshire, for the Respondent.  
*Jeanne Thomas and Mark Edwards, Esqs.*, of Nashville, Tennessee, for the Respondent.

<sup>1</sup> On March 28, 1994, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a supporting brief. Both the Respondent and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> The judge erroneously stated that Twitty's rumors about Kuhn involved events which took place while Agnes Rockett, the alleged source of the rumors, was still working as Kuhn's supervisor at Massachusetts General Hospital. Rockett quit working with Kuhn in 1986, however, and that the alleged firing and grievance occurred in 1987. Contrary to the General Counsel, we find that this mistake of fact does not warrant reversal of the judge's finding that the rumors about Kuhn were false.

<sup>4</sup> The judge stated his belief that Twitty had an obligation to verify the rumor before using it in an attempt to discredit Kuhn. If Twitty had reasonably believed that the rumor was true, she would not have forfeited the Act's protection by good-faith repetition of the rumor even if she failed to investigate its accuracy. See, e.g., *KBO, Inc.*, 315 NLRB 570, 511 fn. 6 (1994). On the other hand, in the circumstances of this case, where Twitty already either knew or reasonably should have known that the rumor was false, the failure to verify the rumor is further evidence of the bad-faith, personal, and unprotected nature of her activity.

*Paul McEachern, Esq.*, of Portsmouth, New Hampshire, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on a charge filed by Madelon Twitty, an individual (Twitty or the Charging Party) on September 2, 1992,<sup>1</sup> and an amended charge filed October 7, the Regional Director for Region 1 issued a complaint and notice of hearing on November 6, alleging that HCA Health Services of New Hampshire, Inc. d/b/a HCA/Portsmouth Regional Hospital (PRH, the Hospital, or Respondent) unlawfully interrogated Twitty and then unlawfully suspended and discharged her in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed a timely answer in which it admits the factual jurisdictional allegations of the complaint, and denies having committed any unfair labor practices.

Hearing was held in these matters in Portsmouth, New Hampshire, on December 13–15, 1993. Briefs were received from the parties on February 17, 1994. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

At all times material to this decision, Respondent has been engaged in the operation of an acute care hospital in Portsmouth, New Hampshire. It has admitted the factual allegations of the complaint with respect to jurisdiction and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *The Events Leading to the Alleged Unlawful Activity*

##### 1. Background and issues presented

Respondent, Portsmouth Regional Hospital, operates a large acute care hospital in Portsmouth, New Hampshire. It employs about 300 nurses, including full-time, per diem, and part-time staff. The department of the Hospital directly involved in this proceeding is the operating room (OR), which employs about 29 nurses and technicians. The chain of command of the Hospital, as pertinent, begins with William Schuler, president and CEO. Next in authority is Stan Plodzick Jr., assistant administrator for patient services; then Patricia Henschke, associate director of nursing; then Polly Kuhn, OR manager; and her assistant, Patricia Alandydy. The Charging Party, Madelon Twitty, was employed at the Hospital as a registered nurse in the operating room from September 1986 until her suspension and ultimate discharge on July 29. The complaint alleges that Twitty began engaging in concerted protected activity on July 13, and thereafter Respondent, acting through Kuhn, unlawfully interrogated her, restricted her in the exercise of her right to engage in

protected activities, suspended her on July 24, and then discharged her on July 29.

The OR manager, Kuhn, is responsible for managing the OR, which at the time here involved included preparing the annual budget for the OR and preparing the OR for a major inspection by a regulatory body, JACHO.

The duty of the assistant operating room manager, Alandydy, was to “run the schedule,” which involved coordinating the schedule of surgical procedures to avoid problems and generally overseeing the operation of the operating room area. Her specific duties include supporting the nurse manager in running the OR, scheduling nurses for work in 6-week blocks of time, scheduling OR cases on a daily basis, assigning staff to the cases, and acting as a liaison between the OR and other departments in the Hospital. She also interacts with the physicians practicing in the OR.

There are five operating rooms at the Hospital and about 29 full-time and part-time employees are assigned to this function of the Hospital. The employees are either nurses or surgical technicians. Nurses “circulate” and “scrub,” whereas surgical technicians only scrub. Twitty testified that the “circular” is in charge of the procedure in the operating room, is the patient advocate, handles making sure the equipment the surgeon needs is available, fills out necessary paperwork, and is responsible for taking care of any needs that arise during the surgical procedure. The “scrub nurse” puts on a sterile gown and gloves, and handles the passing of instruments to the surgeon during the procedure. There was one housekeeping employee assigned to the OR who changed beds and mopped floors between cases. There were central supply personnel who washed and reset instruments.

At the time of Twitty’s discharge, Kuhn had been her supervisor for about 5 months, having replaced the former operating room manager, Agnes Rockett, who had retired after several years of service to the Hospital. Twitty testified that there was a vast difference in the managerial styles of Kuhn and Rockett. Rockett was a very “hands on” manager, and was very involved in the day-to-day operation of the OR. She was very visible and was very concerned about staff. According to Twitty, Kuhn’s style was totally uninvolved, and she stayed in her office all day. She did not come back in to the operating rooms and in Twitty’s opinion did not seem concerned about the staff or what the staff did. Rockett would run the schedule whereas Kuhn would not. Similarly, Rockett would occasionally perform the nursing duties of circulating or scrubbing, whereas Kuhn would not.<sup>2</sup>

The General Counsel introduced Twitty’s employee performance evaluations prepared annually by Respondent, covering the period 1987–1991, and signed by Rockett. These evaluations generally reflect adequate or better performance by Twitty, but note an ongoing absenteeism problem related to her health. Also placed in evidence were several disciplinary records from Twitty’s personnel file. These include (1) a

<sup>2</sup>The evidence also indicates that Rockett accorded Twitty with more favorable treatment vis-a-vis the other members of the staff. This practice stopped with the hiring of Kuhn. For example, fellow nurse Beth Delcambre testified that Twitty had many occurrences or absences over the years. She was often out on Mondays and Fridays, was slow in the rooms, and did not help the other nurses. When Rockett was OR manager, Twitty seemed to get away with such behavior. When Kuhn came on board, however, she was taken to task in a serious way for her absenteeism and behavior.

<sup>1</sup>All dates are in 1992 unless otherwise noted.

warning given her in May 1987 for excessive absenteeism; (2) a warning given her in May 1990 for absenteeism and inappropriate attitude and comments toward other employees; (3) a warning given in August 1990 for absenteeism; and (4) a warning given in June 1992 for absenteeism. The last warning was given by Kuhn and the others were given by Rockett. Twitty was suspended on July 24, and the Respondent's written documentation reflect the suspension was for disruptive behavior and lack of professionalism.

## 2. The hiring of Polly Kuhn as OR manager

Kuhn's supervisor, Plodzick, generally agreed with Twitty's assessment of Kuhn's managerial style as opposed to Rockett's. He also testified that he was primarily looking for someone with computer skills and an analytical mind when he hired Kuhn. The Hospital was going into computerization and such skills would be important. According to him, Kuhn was abundantly qualified on these counts, but was not blessed with an outgoing personality. Kuhn was hired when Rockett announced in 1991 that she was going to retire. The Hospital conducted a search for her replacement, finally narrowing the field to four candidates, including Kuhn. These candidates were interviewed by a selection committee, of which Twitty was a member. She, however, did not attend the meeting at which Kuhn was interviewed. Kuhn had previously worked with Rockett at Massachusetts General Hospital (MGH or Mass General) in Boston.

Rockett graded the four candidates and gave Kuhn the highest mark. She submitted a memorandum of her assessment of the candidates to Plodzick on December 31, 1991. With respect to Kuhn, she wrote:

As she has stated, I worked with Polly Kuhn from 1974 to mid 1986. Since that time she has acquired a BSN, a MSN and a diploma from a computer school. She is a person of great determination who seems focused on what she has to do to reach her objectives. She has had management and computer experience and is absolutely not intimidated by anyone. She did file a grievance against MGH in 1987 or 1988.

Plodzick testified that at the time of her interview, Kuhn explained that she had been laid off by MGH and her job abolished in a reorganization. She grieved the elimination of her job and won, being given a continuing position as a per diem employee. Plodzick did not question this explanation as he was aware of the major upheaval at MGH at the time of the grievance. When he checked Kuhn's references with MGH, that hospital gave only very general and limited information about Kuhn's employment as was its standard practice. He did not look into the matter of the grievance further. Kuhn was hired as OR manager and began working in that capacity in early 1992.

## 3. Kuhn's dealings with Twitty in the spring and problems with her performance as a nurse

One of Kuhn's first duties, insofar as dealing with personnel was concerned, involved Twitty. Twitty had been out of work on a medical leave of absence and returned in April. According to Plodzick, in April, Twitty came to him with a grave concern. She had come back from a leave of absence and was adjusting to her new supervisor, Kuhn. According

to Plodzick, she had real concerns about her continued employment. The two talked about the different management styles of Kuhn and Rockett. Twitty expressed concern over the demands being made of her by Kuhn over her attendance, attitude, and behavior in the OR. Plodzick told Twitty she was going to be held to the same standards as the other OR employees. He felt that in the past, Twitty had had preferential treatment. The staff had come to him on a number of occasions, complaining about this preferential treatment by Rockett and asking that she be treated equally.

Plodzick told her that her relationship with Kuhn was most critical and she had to work closely with her. He suggested that an action plan be worked out so she could meet the needs she was looking for from a manager. He offered to help make the communications happen, but that "the ball was in her court."

Plodzick testified that he met with Kuhn about Twitty. He suggested that Kuhn work out a plan with respect to Twitty and the two meet on a weekly basis to monitor Twitty's performance. He testified that he was shocked to find that Twitty was undergoing psychiatric care and that Rockett had had no formal record of her capability of working under these circumstances. He was concerned about putting her in jeopardy as well as patients.

At an April meeting between Kuhn and Twitty, Twitty gave Kuhn a letter from her therapist, which indicated that Twitty had shown symptoms of major depression over the past 6-8 months and been placed on medication for this condition. The therapist pointed out that with continued therapy and medication, Twitty would be able to return to her normal duties. Following the meeting, Kuhn prepared a report of the meeting, which states:

I met with Madelon today to discuss her absence, 4-13 through 4-20-92 and received a letter from her therapist stating that she is able to return to work after her emotional crises during which she was placed on Prozac. I discussed at length her absences (12) since Jan. 1, 92 and the excessive number the previous year and my concerns that she perform up to standards. I discussed her need to improve rapport with all staff, avoid making sarcastic remarks and assist others during surgery and in turning over cases.

The report details Kuhn's plan to improve Twitty's performance as follows:

The plan discussed with Madelon is:

She will continue her weekly meetings with her therapist and monthly appointments with her psychiatrist who prescribed Prozac.

She will show an immediate, sustained improvement in absenteeism.

She will avoid sarcastic remarks and show an immediate, consistent improvement in work performance, particularly in working with other staff during surgery and to assist with case turnover.

She can come to me at anytime to discuss how she is doing or ask for assistance.

We will meet on Friday, April 24, to evaluate her performance this week and to discuss whether or not she feels she needs additional assistance.

Kuhn's report of the April 24 meeting reads:

I met with Madelon . . . to discuss her performance this past week stating that she had shown improvement in her work performance, rapport with staff and surgeons, and that these efforts need to be displayed on a consistent basis. I reiterated the need for her to show continued improvement in attendance and that her record to date is excessive.

Twitty testified that she did meet with Plodzick in April and told him she felt, after her meetings with Kuhn that week, that she was being harassed by Alandydy. According to Twitty, Alandydy had criticized her for taking too much time to perform a certain task. She stated that "every time I turned around she would be looking in the window at me, and you know, it was perceived by me that she was just trying to rattle me." Alandydy had told her her criticism was based on a report given her by another nurse. Twitty confronted this nurse, who professed no knowledge about the matter. She also gave Plodzick her medical history which included a period of depression. Plodzick suggested she take the matter up with Kuhn. Twitty then told Kuhn what she had told Plodzick and Kuhn said she would speak with Alandydy. After that, Twitty said she had no problems with Alandydy. Twitty did not remember Plodzick discussing her continued employment being in question in the April meeting.<sup>3</sup>

It appears that Alandydy was keeping an eye on Twitty at about this time. Alandydy kept some daily notes, and from these she testified about some complaints she received about Twitty. There was a complaint in March from a surgeon about Twitty being slow in turning over cases in the OR. As I understand it, turning over rooms or cases involves moving a patient from an operating room after an operation and preparing the room for another operation. According to Alandydy, this should take about 15 minutes. Twitty was described as taking considerably longer to accomplish this task.

Alandydy described a meeting in March between Kuhn and the staff surgical technicians. The technicians believed that their functions were being taken away from them and they had complaints about Twitty, primarily that she was rude and condescending toward them. She noted a complaint from a doctor in April that Twitty was on the phone when she should have been in the OR. She noted a complaint from another doctor in April that Twitty took an excessive time to prepare a patient for surgery. Twitty became very angry when Alandydy confronted her about this matter.

In late April or early May, a nurse anesthetist complained that Twitty was slow in turning over the OR. A surgeon involved in the incident was very angry as well. Again, Twitty was angry with Alandydy when confronted about the incident. Alandydy told Twitty that she was getting slower with the passage of time. She believed it was because of Twitty's depression.

Alandydy noted on May 28 that Twitty took an excessively long lunchbreak. This could be a problem as it might affect afternoon scheduling of operations. This was reported to Alandydy. In June, Twitty was late for work on 3 con-

secutive days, June 16-18. She noted that Twitty was very rude on June 29 or 30.

Alandydy testified that several doctors, including a Dr. Looser and a Dr. DiAngelo complained that Twitty was slow. An anesthesiologist, Dr. Andelman, complained that Twitty's behavior was passive aggressive. Most of the complaints came in the latter part of 1991 and the first part of 1992. Twitty was virtually the only nurse about whom she received complaints.<sup>4</sup>

Kuhn gave her a warning for absenteeism on June 12. Kuhn told her that she had a problem with absenteeism and that if the situation did not show immediate improvement, Twitty's continued employment would be in question. Twitty replied that she would continue to do her best and would continue with the treatment she was receiving. Twitty had been out with a sinus infection. She testified that she had no additional absences between that date and the date of her discharge.

#### 4. Twitty's concerns about Kuhn's manner of supervision and her actions in response

Twitty testified about a meeting with Kuhn in May. In attendance at the meeting were fellow nurses Nancy Eastman and Sheila Jeter. The meeting concerned vacation scheduling, because all three wanted vacation at the same time and the policy was that only two RNs are allowed vacation at the same time. Kuhn asked which of the three would be willing to change her plans, all three indicated their plans were firm. They discussed ways to cover if all three were to be out at the same time, mentioning increasing the hours of the per diem and part-time employees. Jeter asked Kuhn that considering that many of the major projects that Kuhn was then handling, including preparing the OR budget and preparing for a major inspection, would be completed by the date of the nurses' vacation, would she run the schedule while they were out, thus allowing the assistant OR manager, Pat Alandydy, to perform nursing duties. Kuhn declined.

Twitty testified that in early July, the OR was short staffed. One staff member resigned, one had a broken leg, and another was undergoing treatment for cancer. Another staff member was on medical leave and a fifth, a part-time staffer, was on maternity leave. This situation increased the amount of call hours of the remaining staff. The hours of routine staffing for the OR is the day shift, from 7 a.m. to 3 p.m. One team worked an overlapping shift, from 12 noon to 8 p.m. The rest of the 24 hours was covered by oncall personnel. The call was broken into weekdays and weekends.

<sup>4</sup>This evidence regarding complaints about Twitty's performance is set out to demonstrate that when it made the decision to discharge Twitty, it was not dealing with a perfect employee. As will be discussed later, Plodzick testified that Twitty's overall performance was taken into account when the decision was made to discharge her. I believe this recitation of complaints is sufficient to give the reader an idea of the problems Twitty was having with the other staff members and the physicians practicing in the OR. I believe such complaints may have led to Twitty's ultimate discharge. The discharge, however, was entirely based on Twitty's actions on July 23. Had she not taken the action she did, she would not have been discharged, at least not at the time Respondent took this action. Therefore, I find it unnecessary to detail the numerous other examples of problems with Twitty given by several doctors and nurses who testified in this proceeding.

<sup>3</sup>To the extent that a credibility gap exists on this point, that is, Twitty's continued employment being in question, I credit Plodzick, based not only his testimony, but the contemporaneous records of Kuhn set out above.

A nurse would be oncall about 1 day a week and one weekend in five. A nurse oncall had to remain reachable and available to work within 20 minutes of being called. The understaffed situation in July increased stress and hardship for the employees. As an example of this, Twitty testified that Jeter one day worked her regular day shift and was called back in that night. She had to work, running the schedule, the following day because Alandydy had taken a vacation day. Twitty asked Jeter, who was looking stressed, if she had asked Kuhn to run the schedule. Jeter said she had not asked.

Twitty said the staffing problem was a matter of constant comment among the staff. She said that the staff had given Kuhn the nickname, "Phantom of the OR."<sup>5</sup> Twitty objected to Kuhn staying in her office, because it made Twitty have to work more hours. Twitty brought up the staffing matter with Alandydy on July 12. She told Alandydy that there was a lot of discussion among the staff about Kuhn's lack of visibility and her unwillingness to support the staff during the period of short staffing. According to Twitty, Alandydy replied that she had talked with Kuhn about the matter to no avail, and that Kuhn needed to hear about it from the staff, encouraging Twitty to bring the matter up at the next staff meeting which was scheduled for the following week.<sup>6</sup>

A report of the staff meeting chaired by Kuhn and held on July 21<sup>7</sup> states:

Staff have requested more time for discussion. Due to all that must be done prior to JACHO review, we have been focusing on this. Today's meeting will be an Open Forum for discussion of staff concerns, and we will have more meetings like this when we can work them in.

Staff raised the issue of staff assignments; some staff feel that they are assigned the more difficult cases, and others are never assigned these cases, as in ortho. What are your expectations of staff assignments?

Polly stated that she expected assignments to be fair and equal and if anyone felt that this was not being done to see her.

Discussion ensued regarding the staff's desire to rotate vs being assigned to the same services all the time. Polly agreed with this idea; in a small hospital where staff are on vacation, out ill etc. and taking call, it is important to maintain one's skills in as many areas as possible, to maintain the department.

<sup>5</sup> Although this is an amusing name to give Kuhn, I cannot find in the rest of the testimony that anyone other than Twitty used it.

<sup>6</sup> Alandydy testified about this meeting and though her version differed slightly, she evidently encouraged Twitty to bring the matter up at a staff meeting. Alandydy also testified, and I believe credibly, that members of the staff had no hesitation in approaching her and other members of management with complaints, problems, or issues of concerns. Henschke also offered similar credible testimony about her willingness to address employee concerns and the lack of hesitation of the staff to bring such concerns to her. Moreover, other than Twitty, no witness testifying indicated that there existed any problem with approaching Kuhn with problems.

<sup>7</sup> This report is dated July 14, 1992, but the other evidence indicates that only one scheduled staff meeting was held in July and it was held July 21. The meeting as described in this report comports with the testimony describing the meeting of July 21.

. . . The question of whether Polly planned to work in the rooms was raised by Madelon Twitty. Polly stated that at the present time with the staffing shortage, it was most important to continue with the interviewing in order to fill open positions and alleviate the situation. In terms of the future, Polly said that although she would like to be able to work in the rooms periodically, it would depend on future expectations of her as a manager and requirements managing the department, which would have to be weighed on a daily basis.

Kuhn was addressing the problem of short staffing. She was advertising in local papers for part-time and per diem nurses to fill the temporary vacancies. She, together with Henschke, was working to find additional babysitters for a current part-time nurse so that nurse could work more hours.

A written report prepared by Alandydy, states:

On July 21, 1992, 0700-0800, the Operating Room had its monthly nursing staff meeting. At the end of the meeting, Madelon asked Polly Kuhn, OR Nurse Manager, if it was her intention to work either at the desk or out back due to our present staff shortage. Polly stated that most probably that would not be happening and cited several reasons why.

Twitty also testified about this meeting. With respect to the staffing issue, she remembered Kuhn telling the employees she was advertising to fill the openings in the OR, but had not received applications from any qualified nurses. Kuhn said she intended to continue to seek applicants for these positions. Twitty at this point told Kuhn that there was a lot of discussion among the staff about Kuhn's visibility and support and asked that Kuhn run the schedule on busy days. Kuhn declined, saying her time was better spent trying to fill the positions. After the meeting, in Twitty's opinion, the staff appeared to be resigned to Kuhn's position.

Later in the day of July 21, Twitty spoke with Patty Henschke, Kuhn's superior. Henschke asked Twitty how she was doing and Twitty said she had been better. Henschke inquired what the problem was and Twitty said, "It's the new Nurse Manager we have. She spends eight hours a day in her office and is not responsive to any of our problems." Henschke asked if Twitty had tried to discuss the problem with Kuhn and Twitty replied, "It wouldn't do any good anyway."

Henschke remembered the conversation as well. She remembers Twitty bringing up Kuhn's answers to questions that had been raised at the staff meeting. These related to support of staff versus physicians and the matter of helping in the OR because of short staffing. After a brief discussion of the physician abuse issue, they discussed Kuhn's responses to the staffing issue. Henschke explained to Twitty that she believed that Kuhn was doing everything possible at that point. She told Twitty that Kuhn had met with her and discussed advertising and was helping a part-time nurse get babysitting help so she could work more. Henschke was satisfied with Kuhn's actions and pointed out that the staffing situation in the OR was not unusual.

Alandydy had a conversation with Twitty at the end of this day as they left the OR. According to Alandydy, "Madelon stated to me that it was 'time to get a new search committee together,' and that 'Polly was not what she represented her-

self to be.' In addition, Madelon made several comments regarding our instrument budget and money constraints, and that 'Agnes [Rockett] would have devoured Dick Senger.' I told Madelon I thought she was being rather harsh and went to my car."<sup>8</sup>

##### 5. The actions of Twitty that lead to her discharge

The next day, Twitty was off duty and drove to visit Rockett, who ran a consignment shop in New Hampshire. Twitty complained about Kuhn, and, according to Twitty, Rockett told her that she had supervised Kuhn when they both worked at Massachusetts General Hospital in Boston. She went on to tell Twitty that Kuhn had been fired for abandoning a patient, that Kuhn had filed a grievance over the termination and won before the grievance board, and had been reinstated. Twitty testified that Rockett also told her that Kuhn had been involved in loss of some computer data when she left Mass General. She further testified that Rockett told her that Kuhn did not get along well with her peers, and that she, Rockett, had spent a lot of time "bailing Polly out" of situations she had gotten herself into. Twitty claims that Rockett told her that if she planned on sharing this information with other employees at the Hospital to say she had heard the information from another source and had gone to Rockett to confirm it.<sup>9</sup>

That evening, Twitty tried to call fellow nurses Carla Decker, Beth Delcambre, and Sheila Jeter to share the information about Kuhn. However, they were not home. The next morning, on arriving for work at the Hospital, she walked in

from the parking lot with Delcambre and another nurse, Laurel Pritchard. According to Twitty, she told them what Rockett had told her about Kuhn, and added that "things were not going to get any better, unless we got together and tried to present some kind of united front to Polly of what we thought were the problems and how to handle them."

At breaktime that morning she met Decker in the cafeteria and relayed to her the same message she had given the other nurses in the parking lot. Twitty told Decker that she was upset that the committee had not been given this information. The committee she refers to was the selection committee that had conducted the search for Rockett's replacement. Twitty testified that Decker said she had been told all of this 6 months before and that the past was not important, the only thing that mattered was the present. Twitty said that the past is affecting the present and history is repeating itself. According to Twitty, Decker said that Twitty should drop the issue, that she had made herself visible, and there was nothing to be gained by pursuing it. Twitty said it was too important to drop.

Later that day, she was involved in a conversation with Jeter, Delcambre, and Pritchard, and reiterated what she had said to them in the parking lot. Alandydy came into the room where the nurses were talking and said that Kuhn wanted to see her. As Twitty left the room, she told the other nurses, "Agnes [Rockett] also told me that Polly was on a six month probationary period and that maybe we should think about going to see Stan [Plodzick] to see if we could have the probation extended until we could work these problems out."<sup>10</sup>

Laurel Pritchard testified that she had a conversation with Twitty on July 23 on the way into the Hospital from the parking lot and another one in the afternoon of that day. In the morning conversation, Twitty expressed concerns about Kuhn and her supervising the OR. The second conversation was with Twitty, Delcambre, and Jeter. Twitty said that there were issues they needed to discuss, Kuhn's past history and her managerial style. Pritchard testified that Twitty said Kuhn had abandoned a patient while working at Mass General and had dumped some computer information. Twitty said that Rockett was the source of this information. According to Pritchard, Twitty said nothing about Kuhn grieving the matter at Mass General.

Beth Delcambre had been with Pritchard in the morning and remembered Twitty telling them that Rockett had given her some information about Kuhn the night before. She remembered being told that Kuhn had been fired from Mass General for abandoning a patient, had filed a grievance, and that the Hospital had had to hire her back for 1 day a year. She also said that Kuhn was on a probationary period and something had to be done about the matter before August 1. Delcambre's reaction was that Twitty was a "loose cannon." It was Delcambre's opinion that Twitty was out to get Kuhn fired and in that regard was just out for herself. Twitty had told Delcambre that she was angry with Kuhn about her treatment by Kuhn.

In the afternoon meeting with Jeter, Pritchard, Twitty, and Delcambre, Jeter tried to explain to Twitty that they did not know if Rockett was correct in what she had told Twitty, and that Plodzick had checked her background and the things were

<sup>8</sup>G.C. Exh. 22.

<sup>9</sup>Neither Rockett nor Kuhn testified in this proceeding. There is no confirmation therefore that Rockett was indeed the source of the information nor was there any examination of her about the veracity of the information. The General Counsel would have me draw an adverse inference in the matter because of Kuhn's nonappearance. I decline to do so. First, the evidence offered by Twitty on this point is clearly hearsay. No reason was given on the record for the General Counsel's decision not to call Rockett to testify. To offer, as he did, this hearsay evidence merely as explaining Twitty's state of mind and as reason for her subsequent actions, in my opinion, precludes him from asserting the truthfulness of the information without further proof of its truthfulness. Based on the testimony that I heard, I do not believe that the information is true. Several of the witnesses, including Twitty, testified that abandoning a patient is the worst and most serious offense with which a nurse can be charged. Plodzick credibly testified that by law such charges must be reported to the State and investigated, and such a matter would be a major matter. As noted earlier, Rockett herself recommended Kuhn for the job of PRH OR manager, and I consider it inconceivable that she would have done so if she possessed information that Kuhn had been accused of abandoning a patient and destroying MGH computer records. Henschke appeared to me to be a credible witness and she testified that she spoke to Rockett shortly after the events in question and Rockett did not tell her anything about these allegations against Kuhn, even though the conversation was heated and involved complaints from Rockett about the current operation of the OR. Twitty admitted that she made no attempt to verify the information, and at one point in the record admitted questioning Rockett's motives in giving it to her. There is evidence in the record that Rockett passed the same information on to another nurse in the OR, Carla Decker, and she kept the information to herself. Decker evidently told this to Alandydy and to Twitty. For all I really know, Decker may have been the true source of the information. Decker, like Kuhn and Rockett, did not testify.

<sup>10</sup>Plodzick testified that there was no probationary period for Kuhn.

unfounded. She considered the effect of Twitty's statements to be negative on the OR staff.

#### 6. Management learns of Twitty's actions and responds

A contemporaneous written statement describing the events of July 23 and the day following from Kuhn's standpoint is part of Twitty's suspension documentation. This statement appears to me to be a reasonably, concise, and accurate account of these events. I have quoted the material from the report and have added testimony from other sources where I felt it important to tell the whole story.

July 23, 1992 Incident regarding Madelon Twitty

AM—I was informed by Patty Henschke that a staff member had told her that Madelon Twitty was trying to organize the staff regarding issues of my performance, and had made derogatory statements about me.

Henschke testified that on July 23, Carla Decker came to her in the morning and said she was concerned about the welfare of the OR. She went on to say that Twitty had been calling a number of nurses and telling them statements that were untrue or believed to be untrue about Kuhn, to the effect that Kuhn had been fired for abandoning a patient. After being fired and grieving, she went back to Mass General and worked per diem. In the per diem capacity at some point, Kuhn dumped some computer programs that she had put into place so that they were useless to the Hospital.

Henschke testified that she had never heard this allegation before. She added that abandoning a patient is probably the worst thing that a nurse can do. At her hiring interview, Kuhn had indicated that she had been laid off in a reduction-in-force at Mass General.

Henschke considered the statements about Kuhn so malicious that she went to Kuhn. She asked Kuhn about any issues with the staff and Kuhn mentioned things that had been brought up at the staff meeting. She then told Kuhn that a staff member had told her that Kuhn had been fired. Kuhn denied it and said she had been laid off in a reduction-in-force. She then directed Kuhn to speak with Twitty as soon as possible and find out what was going on. Kuhn sent Alandydy to find Twitty. Alandydy found her meeting with Delcambre, Jeter, and Pritchard and told her to go meet with Kuhn.

1:15pm—I met with Madelon in the present of Pat Alandydy. In answer to my question, "I have been told that you are trying to organize the staff regarding my 'performance'—is this or is this not true?" Madelon stated, "yes, it's true."

I stated that I had been told that she had made statements to the staff that were derogatory to me both personally and professionally, and asked whether or not this was true, she answered that it was. I asked where she had heard such information and she stated that she would not divulge her source.

I asked Madelon why she was doing this, why she had not come to me if she had any issues or concerns; she stated that she did not like the answer that I gave at the last staff meeting regarding what my plans were regarding my working in the rooms, and that she did not feel I was "pro staff."

I reiterated the innumerable times that I had asked her to come to talk to me if she was having any problems or if there was anything that she wanted to discuss, and that she had not once done so, unless I initiated the meeting. She stated "you did not give me any warm and fuzzies after I came back from being sick," and that I was "unapproachable." She also stated that the entire staff felt the same way, and that she wasn't the original person to come up with the idea of organizing the staff to meet [contrary to her original admission that she was organizing the staff].

I told Madelon that I could provide emotional and professional support for her but that I could not satisfy all of her emotional support needs, that other people and events outside the workplace needed to be a source for her.

After Madelon reiterated that I was unapproachable and that the entire staff felt this way and that they also felt there were many issues regarding my performance, I told her that I believed I needed to go to the staff immediately to discuss these issues. I asked Pat to call the staff together for a meeting.

Delcambre testified that the meeting began with Kuhn telling the assembled staff that there were rumors flying around that were not true.

1:30pm—In Madelon's presence, I addressed the staff with the issues that she had raised; that she had stated that the entire staff felt I was unapproachable and that they could not come to me with their concerns, and that they were organizing to bring out issues about my performance.

I asked for their comments regarding any of their concerns; the two concerns that were raised were that they wanted to see me more (be more visible) and that they wanted to know if I would support them, particularly in situations such as "abuse" from surgeons and/or the anesthesia staff.

I responded that I would like to be in the rooms more, but that I had to prioritize and make that decision on a daily basis. I explained that I believed my responsibilities at this time with such extremely short staffing was to address the problem and use my time to gaining administrative approval for temporary help, running ads, calling part-time and per diem staff. I had also tried to assist one of the per diem staff who could work but was having a problem with babysitters, and had been able to find several possible resources. All of this takes time and I believed I was taking an approach to alleviate the problem, rather than spend time in the rooms and not be able to address the problem.

Regarding the "abuse" issues, I stated that as a new manager, I had to have more of an historical perspective on the issues—whether it was the entire surgical and anesthesia staff or a few isolated persons. I addressed strategies that have been used in other hospitals, and that I believed that I needed to know the level of support I had on the issue and approach it with a plan that would include all of us—that to jump into the issue knowing so little and without a well thought out approach would not resolve the issue, and would re-

duce my efforts the next time an issue arose. I assured them that I would be addressing this issue.

2:30pm—After talking to Patty Henschke regarding what had transpired, I returned to my office, one of the staff nurses came in to tell me that what Madelon had said did not represent what the staff and that some of the staff had “sat her down on the couch” and verbalized their anger that she had said these things. This nurse stated she herself did not feel that I was unapproachable and she didn’t know of anyone on the staff who did. She also stated Madelon had called several of the staff at home to try to get them to organize regarding my performance. She said “Madelon is just Madelon, she has an unhappy life and we don’t pay any attention to her because we know how she is.” She stated she did not know of any staff who were agreeing with Madelon.

Several staff members came to me, each individually, to state that they did not agree with Madelon and that they did not know of any staff who agreed with her, and extended their support of me.

July 24 7:00 am—Two other staff members came to speak to me in my office to express their anger that Madelon had misrepresented the staff in making here concerns representational of the entire staff. One stated that in her position as coordinator she knew everything that was going on and that no one was organizing against me. “It’s only Madelon.”

Pat Alandydy told me another staff member had called her at 10:00pm last night to say that just before she [Pat] had called the staff together for the meeting, Madelon was talking to 3 staff members about how they had to organize right away because “Polly’s probation is up August 1 and we have to get organized about all these issues.” According to Pat, this staff person also stated that the things Madelon is saying about me were “blasphemous.”

Five other staff members have come since then, all stating that they did not agree with Madelon, and offering their support of me.

Alandydy made some contemporaneous notes (G.C. Exh. 22) of the these events and they read as follows:

On July 23, 1992, following Polly’s meeting with the OR staff at 1315, the following RN’s approached me and stated that in no way did either Madelon speak for them or represent them: Kathy Morris, Sheila Jeter, Beth Delcambre, Laurel Pritchard. There was considerable anger and resentment expressed toward Madelon by Nancy Lamongne and Beth Miller. Jane Steiner stated she told Madelon to think about what she was doing. The staff in general stated they were very upset over “being used by Madelon to grind a person grudge” against Polly Kuhn. Beth Miller came to me and stated that, in no way, would she be part of organizing against Polly. Both Laurel Pritchard and Beth Delcambre stated that on the AM of July 21st, upon arrival at work, Madelon was waiting for them outside the Hospital and said they had to organize right away, and that she had tried to call them the evening prior in this regard. Madelon stated same to Sheila Jeter.

Sheila Jeter, RN, called me at home July 23, 1992, at 10PM very distressed regarding this situation. Sheila relayed to me that Madelon entered OR #4 where she, Laurel and Beth were doing an Ortho project. Madelon stated that they must organize right away, and that Polly misrepresented herself. Madelon informed them that she had spoken with Agnes Rockett, and that Agnes told her following:

(1) Polly was on probation at PRH until August 1, 1992;

(2) Polly was fired from the Massachusetts General Hospital for abandoning a patient;

(3) Polly was allowed to file a grievance or appeal, and she was put on per diem status and allowed to work one day a year in order not to have it on her record that she was fired.

This upset everyone in the OR, and Sheila asked Madelon when this happened, did she have any written proof of it and that no one knew what management expected of Polly, that was between Stan and Patty. Sheila further went on to diffuse this conversation stating that Polly was still new and only here 4 months, having tackled the budget and JACHO. At that point, I interrupted them looking for Madelon, per Polly’s request. This information was also told to Jane Steiner, RN, the same day.

I feel it is necessary to also mention that Carla Decker, RN, approached me at approximately 1500 hour the same day [July 23, 1992] and stated to me that it was she who went to Patty Henschke because she had known of this situation with Madelon, and saw where it was leading, and was concerned for the welfare of the OR. Carla also stated to me, at this time, that this “information” regarding Polly Kuhn [and she repeated the same information as above] had been told to her by Agnes Rockett 6 months ago, and that it was something she never told anyone, due to it being so harmful.

Henschke testified that, on the afternoon of July 23, she learned from Kuhn that she had confronted Twitty about making the statements and Twitty confirmed that she had and that she was trying to get her fired. She added that Twitty stated that she represented the staff. She related to Henschke what happened at the meeting she called. Henschke was extremely concerned and had Twitty’s personnel records made available to her.

She was aware that Plodzik had met with Twitty and told her that if she had any issues that he would work with her in discussing any problems with Kuhn. She was aware that Kuhn was pursuing a plan of action with Twitty. She was aware of problems expressed by staff and physicians about working with Twitty. She looked through the file and saw the warnings given Twitty and looked up the Hospital’s disciplinary policy to see what options were available.

The next morning she met again with Kuhn and reviewed everything. She then met with Bob Carey, the Hospital’s personnel director. He agreed that suspension would be appropriate at the time, so that an investigation could take place. She also spoke with her boss, Plodzik, by phone, as he was out of town. He agreed with the decision to suspend Twitty.

Kuhn’s written statement continues:



July 24, PM—I met with Madelon in Pat Alandydy's presence to state that I had a problem with her lack of professionalism and disruption of the unit, as was exhibited by her calling staff at home to organize about my performance "before my probationary period" was up. I also stated that her statements misrepresented the staff and addressed the staff's anger that she had done so. I reiterated that her statements about me were injurious at both a personal and professional level and undermined my professional credibility. I told her I was suspending her until further investigation of the incident could be completed. Madelon refused to sign the Employee Warning notice.

I told her I would call her sometime the following week to come in and discuss her future employment. She stated "Well, I guess I'll go to get a lawyer."

Twitty described the meeting with Kuhn and the other events of July 23 in her testimony:

Polly asked me if it was true that I was trying to organize the Staff nurses on issues of her performance. And I said, "Yes, it is true." And, she wanted to know who had told me all those lies about her. And, I told her I didn't feel comfortable in giving her that information. And, then she sent Pat Alandydy out to—but I also said that I felt that she was unapproachable, and that other staff members also felt the same way. So, she said, "Well, I think we need to get this resolved right now." And, she sent Pat Alandydy out to gather up the staff members for an impromptu meeting. After Pat Alandydy left the room Polly Kuhn started yelling at me that she could sue me for defamation of character. Pat came back to the office and said that the available was assembling in one of the Operating Rooms, and so we walked down the hallway to the operating room.

Polly just started off by saying that it had been brought to her attention that I was trying to organize the staff on issues of her performance, and that I had implied that I represented the staff on this issue. And, that she just wanted to clear the air, and asked if anybody had any comments to make. Sheila Jeter just made the comment that there had been discussion among the staff about her visibility, and Beth Delcambre said that tempers have been high, and the situation was very stressful. And, there was concern about whether she would support her staff in issues where conflict, you know, the surgeons or whatever were involved. And, I'm not sure who brought up a hypothetical situation of one of the staff members being verbally abused by a surgeon. And, Polly thought about it for a minute and then she said, "Well, since I'm new, the first thing I'd have to do is find out the history of the people involved, and then I'd have to get some history on the incident in question. And, then I'd have to find out if my supervisor supported me. And, then I'd have to find out how much revenue the Surgeon brought into the hospital." . . . After those statements were made, Pat Alandydy interjected that the issue had been addressed with Mr. Schuler in the past, because there had been a real incident of one of the surgeons verbally abusing some staff

members, and that Mr. Schuler supported the staff a hundred percent.

Twitty testified that after the meeting adjourned, Carla Decker came up to her and said that she was the one who had gone to Patty Henschke to tell her what was going on in the OR. She told Twitty that she should drop the matter and start worrying about self preservation.

That evening Twitty received a call from Jeter who told her that she had made herself very visible and that Twitty should drop the matter. Twitty asked if Jeter thought anything had been resolved and Jeter said, "[N]o, but there is nothing that can be done." "They have the power." Twitty then said, "If nobody is willing to support me, then I guess I'll just have to drop it."<sup>11</sup>

#### 7. Twitty meets with Plodzick and is discharged

On July 29, Twitty attended a meeting in the office of Stan Plodzick, the Respondent's assistant administrator and director of nursing services. In attendance at the meeting were Twitty, Plodzick, and Kuhn. Plodzick prepared a report of the meeting and subsequent events which reads:

Meeting was held on July 29, 1992 at 11 am with P. Kuhn, S. Plodzick and M. Twitty present. M. Twitty was placed on immediate suspension on July 24, 1992 by P. Henschke, P. Kuhn in the absence of S. Plodzick for a Class II Violation—"Acts/omissions and deficiencies of serious nature that continued employment would be detrimental to Hospital."

During her suspension, the following facts were obtained and presented to M. Twitty by me at this hearing:

1. M. Twitty attempted to call/organize number of RNs to solicit support for the intent of removing Operating Room Nurse Manager Polly Kuhn, RN.

2. M. Twitty implied that a large number of staff were represented by her viewpoint (on cross, Twitty denied she implied this).

3. M. Twitty used false, vicious, or malicious statements about P. Kuhn as a means of soliciting support for her removal.

4. M. Twitty failed to apply the known chain of command for voicing disagreements within the division.

5. A number of written warnings already exist in M. Twitty's record relative to her attendance, lack of support with staff, sarcastic remarks, and poor work performance, causing low morale among the operating room staff.

6. In addition, I reiterated our meeting in April, when I met with Madelon, following her return from a severe psychological crisis, regarding her initial impressions of new Operating Room Nurse Manager Polly Kuhn. I redirected concerns regarding M. Twitty's work record and need to continue with her psychiatric therapy etc. and ways to deal positively with her interactions with P. Kuhn. In addition, it was clear to Madelon that her continued employment was in question unless she took steps to correct issues that P. Kuhn identified as longstanding concerns that were creating a very negative atmosphere within the operating room department.

<sup>11</sup> The two sources of these rather self-serving remarks, Decker and Jeter, did not testify.

Following the presentation of these facts, M. Twitty related her impressions of her behavior and admitted that she used poor judgment and the malicious statements she made regarding P. Kuhn were not validated, and that she regretted her behavior. Considerable time was spent in discussing the impact that her behaviors, both present and past, have had on the operating room department. I stated that the feeling of P. Kuhn and myself was that regardless of the attempts Madelon might make to correct this incident, it was in our minds of such a serious nature as to preclude her return to the operating room. I therefore stated that she would be terminated for just cause (class II violation) effective immediately, and that we would call her on July 31, 1992, to have her pick up her final paycheck and personal belongings in her locker.

At the hearing, Plodzick in a rather wandering way amplified on his thinking behind the matters set forth in the report. This testimony appeared to me to be something of an attempt to rationalize or expand on the reasons for Twitty's discharge. As Twitty's discharge was internally appealed to the Hospital's CEO and as he upheld the discharge based on the written report set out above and Twitty's statements during an interview with him, I do not give weight to Plodzick's amplification.

Plodzick testified that he believed that the statements Twitty was making about Kuhn were false, and he did not know her source for the information. He cannot remember Twitty telling him it was Rockett. Whether Twitty told him this in their meeting or not, I do not accept his professed lack of knowledge about Rockett being the source. Alandydy's written statement, which was part of Twitty's personnel file clearly states this to be the case.

Plodzick also testified that in the meeting Twitty admitted not knowing that the information about Kuhn was factual and that Twitty further admitted that she wanted to get Kuhn fired. He asked Kuhn what she thought should be done and Kuhn felt that Twitty could not return to the OR, that damage had been extreme, that there would be constant turmoil, and it required her termination.

Regarding this meeting, Twitty testified:

I believe it started out that Stan said they had conducted an investigation into the incidents of the previous week, that numerous staff members had come to them on their own, and had said they did not agree with me. That I was being terminated for a class II violation, that he was shocked that I would make unsubstantiated statements about my supervisor. At that time, I informed him that I gotten names from people that worked at Mass General that could substantiate the statements.<sup>12</sup> They brought up the absenteeism issue, and I asked them if the staff member with the broken leg, and cancer treatments were going to be treated the same way. I know that towards the end of the meeting I—oh, he did ask me what motivation Agnes could have had in telling me the things that she told me. And, I said I couldn't think of anything other than concern for the people that she had managed for five years. And, then I said that—I admitted to using bad judge-

ment in handling the situation and that in the future that I would be willing to support my manager.<sup>13</sup> He stated that the damage was irreparable, and that it would be in everybody's best interest if I just started over somewhere else.

In response to a question of Plodzick's suggestion of her motivation, she testified, "Well, he said 'organizing to oust Polly Kuhn,' and I said that my intention in talking to the other nurses was trying to get a consensus or platform so that we could go to her as a group, and try to solve the problems, within the Department, and that yes, if we didn't get any resolution that way, then possibly looking for a new Nurse Manager would be the best option."

Following this meeting, Plodzick evidently did not further investigate the matter of the truthfulness of the information about Kuhn. He did give his opinion that Rockett would not have recommended Kuhn for the job if she possessed the information involved. Plodzick testified that he dismissed the allegations about Kuhn because in his professional position he knew that such charges are so serious that they are required to be referred to regulatory bodies for nurses and they were not.

#### 8. Twitty's appeal of the termination

Twitty pursued a grievance over the matter, which resulted in a letter to her from the Hospital's president and CEO, William Schuler. The letter, dated August 18, 1992, reads:

I have considered the information you presented me with on August 13, 1992, together with the following documents from your personnel file in my investigation of your grievance appeal submitted to me: (a) Summation of Hearing Following 3 Day suspension dated July 29, 1992, (b) Employee Warning Notice dated July 24, 1992, (c) Employee Warning Notice dated June 12, 1992, (d) constructive Review form dated May 23, 1990, (e) Employee Warning Notice dated September 21, 1990.

Based upon the material I have reviewed, together with the statements you made to me during our meeting, I have concluded that the factual allegations made in paragraphs number 1 through 6 of Stan Plodzick's Summation of Hearing Following 3 Day Suspension were both justified and correct. I also note that you admitted to many of these allegations in our meeting.

The result of the foregoing is that I find that I must deny your appeal of Stan Plodzick's decision dated July 29, 1992, and reaffirm that your actions amount to gross misconduct which are also grossly in violation of Hospital policy (discipline Policy B-2, including Representative Causes 1, 19, 33, and 43). As such you are discharged for cause from your employment at [Respondent].

<sup>12</sup> None of these names were placed in the record nor were any such persons called to testify.

<sup>13</sup> In her affidavit given to the Board in the investigation of this matter, she swore: "I commented that maybe I did use bad judgment, that maybe Rockett did have an ulterior motive in telling me what she did." I credit this version over her testimony at the hearing because, inter alia, it was given much closer to the time of the meeting than was the hearing.

Schuler testified about the meeting with Twitty. He remembered Twitty mentioning issues in the OR involved short staffing and Kuhn's refusal to work in the OR to resolve the problem, and further, Kuhn's lack of empathy for Twitty's problems. Schuler asked her about the statements she had made about Kuhn and Twitty admitted she did not know them to be true. She admitted she had used the normal chain of command to solve problems in the past and had no problem using it. He asked about Twitty's attendance problems and whether they were making the short staffing worse. Twitty then gave him some information about her medical problems.

Schuler testified that from the interview and the documentation, he believed that Twitty had not been dealing with an issue or issues, but with Kuhn with whom he felt Twitty had a bad relationship. He testified he asked her if she used the rumors to "get" Kuhn, and Twitty said yes. In her testimony, Twitty could "not recall" whether she admitted to him that she used the rumor about Kuhn to "get her."

Twitty described the August 13 meeting with Schuler thusly:

I had the documentation for—my medical documentation that I presented to Mr. Schuler. By that time, I had received the copy of the suspension notice, and the termination notice, as I refer to them. I don't know if that's the correct name, but—so I started to go over, point by point the issues in the suspension notice, and basically he didn't want to hear any of that. So then, I presented him with the medical information that I had given to Polly Kuhn earlier, and he said that my medical history had nothing to do with this situation. Then I presented some other documentation that I had worked with at Portsmouth Hospital, sort of like reference letters, as far as my work performance and so forth goes. And, he accepted those and basically said that they were just references for another job. They really didn't have any relative concern to this proceeding. And he asked me if I had anything else to say, and I just said, "I don't understand how somebody can be fired for trying to make things better." And, he said that he would get back in touch and let me know his decision later.

I credit Schuler's version of this meeting. He had contemporaneous notes which tend to confirm his testimony. I also find it difficult to believe that he would not have addressed the matter of the rumors and Twitty's motivation.

After her termination, Twitty filed for unemployment compensation. Her claim form shows that she wrote:

Terminated on 7/29/92 after suspension on 7/24/92 for "disruptive behavior, unprofessionalism." Severe personality conflict with new manager of five months. Five years of excellent clinical evaluations from previous manager. Attending SLL one even per week 5:30-9:00 to acquire credits for RN to BSN program at UNH. Receive accrued leave time in final check from hospital \$891.94.

Respondent's reasons given for the termination on the report are:

Conflict w/new Head Nurse in Operating Room. Was a very good nurse, no problems with work. Was not happy w/new supervisor. Still making decisions the way she did with old supervisor. Thought she was trying to get rid of new head nurse.

*B. Did Respondent Violate the Act in its Interrogation and Discipline of Twitty?*

I find, based upon the credited evidence set forth above, that Respondent interrogated Twitty, suspended her, and discharged her for her actions on July 23 and for no other reason. The whole thrust of the alleged unlawful interrogation of Twitty dealt with her use of defamatory rumors or information about Kuhn in an attempt to organize the nurses to oust Kuhn from her position. Regardless of whose version of the meeting of July 29 one accepts, it begins and ends with Twitty being fired for spreading the rumors or information about Kuhn in an attempt to have Kuhn removed or discharged. Therefore, I do not believe it necessary to discuss whether Respondent would have taken the action it did in the absence of Twitty's conduct on July 23. I believe it abundantly clear that Twitty would not have been interrogated, suspended, or discharged absent this conduct, at least not at the time of the alleged unlawful acts of Respondent.

In deciding whether Respondent violated the Act as alleged, I believe it must first be determined whether Twitty was engaged in concerted protected activity. Clearly the activity for which she was interrogated, suspended, and discharged was her use of the defamatory information about Kuhn with other staff nurses to get them to join her in an attempt to oust Kuhn. Although she was apparently the only employee in the OR who wanted to get rid of Kuhn, I find based on Board law, that her activity was concerted.

In the recent case of *Circle K Corp.*, 305 NLRB 932, 933 (1991), the Board held:

We have previously adopted<sup>14</sup> the Third Circuit's comments in *Mushroom Transportation*<sup>15</sup> defining the scope of "concerted" activity:

[A] conversation may constitute a concerted activity although it involves only a speaker and a listener . . . [when] . . . it was engaged in with the object of initiating or inducing or preparing for group action or had some relation to group action in the interest of the employees.

Twitty's action with respect to her conversations with Pritchard and Delcambre on the morning of July 23 and her later conversations with those two nurses and Sheila Jeter meets this test. Although I do not believe her motivation was as stated by her, the evidence reflects that she told them the information about Kuhn and asked them to join with her in an attempt to change Kuhn's management style or failing that, to have her removed. Trying to get a supervisor fired, provided that the supervisor affects the employee's terms and conditions of employment, is protected. *Oakes Machine Corp.*, 288 NLRB 456 (1988) (employees complained about

<sup>14</sup> *Meyers Industries*, 281 NLRB 882, 887 (1986), enf'd. 835 F.2d 1481 (D.C. Cir. 1987).

<sup>15</sup> *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

supervisor's "attitude" toward them in effort to have supervisor discharged); *Puerto Rico Sheraton Hotel*, 248 NLRB 867 (1980) (letter from employees seeking corporate parent to discharge hotel manager for being a "dictator" who talked down to employees, rejected suggestions, and was inaccessible).

On the other hand, such activity may lose its protection under circumstances when such conduct includes defamatory statements, bad-faith conduct, or deliberate and malicious falsehoods. *Puerto Rico Sheraton Hotel*, supra at 874; *American Hospital Assn.*, 230 NLRB 54 (1977). As I believe that Twitty's actions can be said to be all of these things, I find that they lost the protection of the Act.

First, there is no question but that the statements she made about Kuhn were malicious and defamatory. Twitty, and all other nurses asked about the seriousness of charging a nurse with abandoning a patient, without hesitation said it was the most serious offense with which a nurse can be charged. As it strikes to the very core of the nurses' professional responsibility and reason for being a nurse, such a charge seriously attacks a nurses basic integrity and credibility. Plodzick testified that such a charge left unchallenged would have destroyed Kuhn's ability to lead the OR. I agree.

Second, I believe the statements relayed by Twitty to the other nurses about Kuhn are untrue. Twitty had no proof that what she said was factual. She accepted Rockett's alleged statements without taking any action to checking their veracity. Kuhn denied them in their meeting, calling them lies and threatening that they could form the basis for a defamation lawsuit. Kuhn also denied the truthfulness of them to Henschke. As I stated earlier, I do not draw an adverse inference in this regard because Kuhn did not testify in this proceeding. Rockett, the alleged source of the information did not testify. If such information was true, she was possessed of such knowledge at the time she recommended Kuhn as her replacement. The supposed firing and grievance took place at a time when Kuhn was working at Mass General under Rockett's supervision. She noted the fact of a grievance being filed in her memorandum to Plodzick recommending Kuhn. Surely, if the grievance had been over the matter of her abandoning a patient, she would have mentioned that very important point to Plodzick. Further, the Hospital was looking for someone with computer skills. Would Rockett recommend a person accused of dumping computer data at Mass General for a similar position at PRH? Kuhn's explanation that the grievance was over the abolishment of her position makes far greater sense. Twitty also claimed in her testimony that she knew of persons who could substantiate her claim, but no such person testified in this proceeding. Thus, I believe and find that Twitty not only spread a defamatory and malicious statement, but one that was also false.

On the other hand, even if the information was true, I believe that Twitty's motivation in using the information had nothing to do with her fellow employees' working conditions and everything to do with her own survival at the Hospital and her personal relationship, or lack thereof, with Kuhn. The only basis for Twitty believing that the information was true was that she obtained it from Rockett. She admitted that she, at least after the fact of disseminating the information, questioned Rockett's motive in divulging the information to her. Given the serious and personally damaging nature of the information, I believe she had an obligation to verify it inde-

pendently, assuming that she was really attempting to use it to better the working conditions in the OR. However, I believe that Twitty was acting in bad faith, and I do not believe that on July 23, she was trying to solve anyone's problems but her own.

I agree with the numerous witnesses who believed that Twitty was trying to get Kuhn fired for own personal reasons. I cannot be sure of Twitty's motivation as one can never be entirely sure why a person takes any given action. However the evidence certainly supports the finding that she was concerned about her continued employment as she did not share the rapport with Kuhn that she had with Rockett. I believe she did not like Kuhn and did not feel that Kuhn supported her, or gave her the "warm and fuzzies" as had Rockett. Certainly, her action could not have rationally been motivated by any sincere attempt to solve the perceived problems or issues she raised in the July 21 staff meeting.

Twitty's asserted reasons for her spreading the rumor about Kuhn was that it would force Kuhn to face the issues she championed, making Kuhn more approachable, more visible in the OR and more willing to fill in to help out the temporary staff shortage. Would spreading an extremely damaging and personal rumor about Kuhn make her more accessible to the staff? Would it likely make her become more visible in the OR? The only logical answer to these questions is no. As the Hospital points out, if the rumors had any basis, and leaving Twitty in place after spreading the rumors would give them at least some validity, Kuhn would have such a diminished credibility with the staff it is unlikely she would ever show her face there. Looking at the situation from Twitty's point of view, did she ever expect Kuhn to be more accessible to her in particular once Kuhn learned that she started the rumor. I think not. If Twitty was trying to solve the staff shortage problem by having Kuhn work in the OR, how would having her fired help. The immediate staffing problem was temporary, and Kuhn was trying to solve it both on a temporary basis by helping with the babysitting problems of an existing employee, and in the long run, by advertising for new employees. If Kuhn was fired, she clearly could not have filled in. Moreover, until a replacement for her was found, there would have been a further staff shortage. I simply do not believe that Twitty was trying to organize support to force some changes in Kuhn's management style or have her fired if that failed. I believe that she was trying to get Kuhn fired, period. There is no relationship between the information Twitty was spreading and the problems of accessibility or short staffing.

This is not a case where an employer is shown to reject employee input on issues of working conditions or to instill fear in its employees that raising issues or rocking the boat will result in adverse consequences. On the contrary, this Hospital seemed to genuinely invite its employees to raise issues with any level of management. They were encouraged to do so in staff meetings and in one on one meetings with supervisors. It is noteworthy that when Twitty raised concerns about working conditions with Henschke, Alandydy, and at the staff meeting with Kuhn, her concerns were addressed fully and without any sense of rancor or upset at their being raised. Clearly she did not like the answers, but the willingness of this management to address issues and be open to the staff is demonstrated.

The Hospital also demonstrated that it has no objection to staff seeking the removal of a supervisor, so long as it is done with some relationship to working conditions and in a manner that does not damage the operation of a department. Henschke noted that in 1990, the Hospital had just hired a new person to be nurse manager for the critical care unit. Shortly thereafter, a number of staff from the unit got together to discuss the new manager's performance. They decided the person was not qualified for the job and presented this position to Henschke. Henschke looked into the matter, agreed with the staff's assessment and eventually terminated the manager. She contrasted this situation with that involving Twitty by saying that the employees involved in the earlier attempt to remove their supervisor were not saying malicious and vindictive things about the manager and acting from ulterior motives.

I do not believe that it would effectuate the policies of the Act to reward an employee for trying to destroy the reputation and end the employment of another employee simply to serve her own ends. Having found that activity for which Twitty was suspended and discharged was not protected by Act, I will recommend that the complaint allegations in these regards be dismissed.

I similarly find that the meeting or interrogation involved was not violative of the Act under the circumstances. I believe Kuhn, on learning of the spreading of the rumor by Twitty with the obvious purpose of stirring up support to get Kuhn fired, reasonably wanted to verify what was happening. In the absence of the rumor aspect of Twitty's actions, I would find the interrogation unlawful. However, one cannot divorce the spreading of the rumor from any other action taken by Twitty. The rumor was so damaging I believe Kuhn was forced to take immediate action or the situation would

get out of hand. I do not find that Kuhn's suggestion that Twitty should have come to her rather than spreading the rumor to be unlawful. I believe that Twitty had some obligation to verify the rumor, either by confronting Kuhn with it or by passing it on to one of Kuhn's supervisors, before using it in an attempt to discredit Kuhn. As the conduct about which the interrogation took place was not protected, I do not find the interrogation violated the Act as alleged in the complaint.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating, restricting the activities of, suspending or discharging Madelon Twitty for engaging in conduct protected by the Act.

3. The conduct about which Madelon Twitty was interrogated, and for which she was restricted, suspended, and discharged, was not conduct protected by the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>16</sup>

#### ORDER

It is ordered that the complaint be dismissed.

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<sup>16</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.